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No. 02-1267

IN THE

Supreme Court of the United States

CHARTER COMMUNICATIONS, INC.,
CHARTER COMMUNICATIONS PROPERTIES, LLC,
AND PAUL G. ALLEN,

Petitioners,

v.

COUNTY OF SANTA CRUZ, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief in response to the Brief for the United States and the Federal Communications Commission as Amicus Curiae, filed November 19, 2003.

Thé Solicitor General agrees with petitioners that the court of appeals' decision was wrongly decided. The Solicitor General concurs that the Ninth Circuit erred in failing to protect adequately the federal interest in uniform national standards for cable franchising. The Solicitor General also considers this to be an important issue, on which this Court may wish to grant review. Nevertheless, the Solicitor General suggests that the court may wish to wait for further development of the law in this area. This suggestion to postpone review is unrealistic, and both fails to recognize the substantial real world economic costs that will be incurred in the interim and fails to take into account the significant practical obstacles to the development of future cases involving denials of transfers.

1. The Solicitor General agrees with petitioners on virtually all of the key substantive aspects of this case:

- The Solicitor General agrees that the Cable Communications Policy Act of 1984 (1984 Cable Act)[1] was designed to provide uniform national standards for cable franchising and, in particular, "to provide stability and certainty to the process of granting and renewing cable franchises," *1984 House Report* 22. (U.S. Br. 2.)

- The Solicitor General agrees that, in promulgating rules implementing the Cable Act, the Federal Communications Commission expressly cautioned that "in exercising their transfer jurisdiction, franchising authorities may not seek to circumvent

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[1] Pub. L. No. 98-549, 98 Stat. 2779 (42 U.S.C. 521 *et seq.*).

the Commission's authority over rate regulation, franchise fees, or other matters. For example, a franchising authority may not delay a transfer or impose conditions on a transfer authorization that would impinge upon the Commission's statutory authority."[2] (U.S. Br. 4-5.)

- The Solicitor General agrees that the undisturbed district court findings are that the County of Santa Cruz acted for "multiple reasons that were impermissible under federal law" in denying Charter's application to transfer its cable franchise. (U.S. Br. 13-14.)

- The Solicitor General agrees that "the court of appeals erred in permitting the County to act for reasons that violate federal law." (U.S. Br. 15.)

- The Solicitor General agrees that the decision of the court of appeals "fails to provide adequate protection to federal law and federal interests in this [cable] area." (U.S. Br. 15.) As the Solicitor General notes, "[t]he Ninth Circuit's decision upholding the County's denial of the transfer application invites circumvention of federal law by local franchising authorities and would fail to vindicate important federal rights." (U.S. Br. 16.)

- The Solicitor General agrees that allowing local governments to use the transfer process to extract unlawful *qui pro quos* from franchisees is a "disturbing prospect" that "threatens the achievement of the Cable Act's purposes to 'establish a national policy concerning cable communications,' 47 U.S.C. 521(1), and to 'promote competition in cable communications

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[2] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 6828, 6834 n.38 (1993).

> and minimize unnecessary regulation that would impose an undue economic burden on cable systems,' 47 U.S.C. 521(6)." (U.S. Br. 18.)

Not surprisingly, therefore, the Solicitor General agrees that "[t]his Court accordingly may wish to grant certiorari in this case." (U.S. Br. 2, 18.)[3]

2. The Solicitor General, however, goes on to suggest that the Court "may benefit from postponing review" until other courts of appeals have addressed this issue. (U.S. Br. 19-20.) This recommendation ignores the significant, real-world consequences of such a delay.

Allowing the Ninth Circuit decision to stand will have a serious impact on transactions and franchise renewals in the cable industry. In the wake of the Ninth Circuit decision, local franchising authorities are being *encouraged* to make unlawful demands on cable operators (and ultimately, their customers), even with extortionate motives. They are being encouraged because of the expectation that by including one arguably legitimate rationale with their demands, they can pass judicial scrutiny based on the court of appeals' decision. In addition, they are aware that the Ninth Circuit's lax standard allows them to impose such significant delays on cable transactions that cable operators are likely to accede to all demands in order to avoid time consuming and uncertain litigation that could imperil significant transactions for financing and sale. The Solicitor General's recommendation, therefore, would ignore the substantial costs of postponing review for a day that may never come or only after there has been a

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[3] The Solicitor General urges that review be granted on a different question than petitioners presented. Petitioners agree that the issue concerning "mixed motive" decisions identified by the Solicitor General is an important one, and would urge that the writ be granted on this question alone or in addition to one or more of the questions posed by petitioners.

significant and damaging financial impact on the cable industry and cable subscribers.

The lower court's erroneous decision, if permitted to stand, will be the governing law for the almost one thousand cable systems serving 11 million subscribers in California and the other states within the Ninth Circuit. *See* TELEVISON AND CABLE FACTBOOK, Cable Vol. 2 (2003). This Court has previously commented on California's importance as "one of the largest, most populated . . . States in the Nation." *Saenz v. Roe*, 526 U.S. 489, 492 (1999), and recognized this as the basis for granting review of programs that are exclusive to California. *See id.; Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003) (California milk pricing and pooling laws). Here, the court of appeals decision invites these local franchising authorities in California and eight other Western states to use "plausible" pretexts to extract impermissible concessions in violation of federal law.

Yet, the economic costs of the Ninth Circuit's decision will not be limited to California or the Ninth Circuit. Rather, transactions such as Paul Allen's purchase of Charter Communications, or the merger of AT&T and TCI, or the recent merger of Comcast and AT&T, are national deals. Even if limited to the local franchising authorities within the Ninth Circuit, these national transactions will be chilled or, at a minimum, incur substantial additional costs if companies are required to satisfy local franchising authorities' unlawful demands in order to receive consent to the transfers.[4] Moreover, many other local franchising

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[4] Adelphia, Charter, Comcast, Cox, and Time Warner all have numerous cable systems within the Ninth Circuit. *See* TELEVISION AND CABLE FACTBOOK, Cable Vol. 2 (2003). Thus, the County of Santa Cruz, this time joined by the City of Santa Cruz, used their new-found powers under the decision to try and hold up the Comcast/AT&T merger. http://www.multichannel.com/article/CA261337. In addition, because franchise "transfers" that local franchising authorities may review often include simple refinancings or changes in control within

authorities and their consultants in states outside of the Ninth Circuit have watched developments in this case and will use it as a basis for making unlawful demands in the franchise renewal and transfer process. The cumulative cost and burden resulting from these improper demands for concessions will create a marked barrier to transfers, threatening the industry consolidation and flow of capital needed to keep pace with technology and deliver to consumers new programming, information, and broadband services.[5] The cable industry and American consumer should not have to incur the serious adverse consequences of the delay suggested by the Solicitor General.[6]

In addition, the Solicitor General does not fully recognize the practical hurdles cable operators must overcome in order to ever reach this Court. If the Ninth Circuit's decision stands, abuse of the transfer process will continue without being litigated, because the practical reality is that national cable transactions are multi-billion

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an existing corporate framework, routine business operations of the cable systems in the Ninth Circuit can be similarly held up.

[5] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations*, 15 F.C.C.R. 9816 (2000).

[6] As the amici curiae National Cable & Telecommunications Association, California Cable & Telecommunications Association, and American Cable Association stated in their brief in support of petitioners:

> The practical consequence of [the court of appeals] decision is considerable. . . [T]he impact of the decision will extend well beyond the Ninth Circuit. . . If some of the systems being transferred are in the Ninth Circuit, and, as a result of the decision below, those systems will be effectively forced to relinquish statutory and First Amendment rights in the transfer approval process, many of those transactions will be discouraged. Insofar as such transactions improve efficiency, cable subscribers across the country will be worse off. [ ] Thus, the case presents questions of broad national significance. (Amici Br. 15.)

dollar deals that cable companies are unwilling to jeopardize. Many transactions are on tight time frames or must close before a year's end for tax reasons. Any delay by a local franchising authority would put those transactions at risk.[7] As a result, the safer course typically is to acquiesce to the demands for cash payments or other unlawful concessions by individual local franchising authorities. The reality is that only in rare circumstances will there be an opportunity for a test case to develop and work its way through the court system. In the meantime, the very things that the Solicitor General recognized as "disturbing prospect[s]" and distinct "threats" will, in fact, occur, such as the invitation to local franchising authorities to circumvent federal law (U.S. Br. 16), the franchising authorities' accomplishment of "forbidden ends" by conditioning approval of transfers on illegal cash payments or other concessions (U.S. Br. 17), and the chilling effect on national cable transactions.

Finally, the Solicitor General's assumption that the Court has the need for the development of the law by other circuits is contradicted by his own brief. As he notes, the federal courts, including this Court, have addressed the problem of "mixed motive" decisions on numerous occasions in other contexts.[8] (U.S. Br. 17-18.) There is no

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[7] For example, in 2002, the City of Thousand Oaks convinced a district judge to enter a preliminary injunction barring the transfer of the cable system. It took over a year for the Ninth Circuit to reverse the decision as an abuse of discretion. It reversed on technical grounds that the local franchising authority had waived a key argument, and over a dissent that the local franchising authority was within its discretion under *Santa Cruz*. *City of Thousand Oaks v. Verizon*, 2002 WL 987910 (C.D. Cal. 2002), *rev'd*, 69 Fed.Appx. 826 (9th Cir. 2003). Such delay and uncertainty can seriously affect major national cable transactions, refinancings and equity transfers. In these circumstances, the economic pressure to accede to unlawful demands is overwhelming.

[8] The decisions of the other courts of appeals are in direct conflict.

Footnote continued

reason to believe that the cable context should be different, and the Solicitor General does not suggest otherwise. *Id.* (listing Title VII, Labor, First Amendment and other cases addressing "mixed motives" and stating that "A similar standard, rather than the court of appeals' 'any permissible factor' standard, would be appropriate here.").[9]

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with the Ninth Circuit's ruling below. Other circuits in a variety of contexts have followed the "motivating factor" analysis, whereby "a challenged action based on both permissible and impermissible motives violates the federal prohibition unless the same action would have been taken in the absence of impermissible motives," (U.S. Br. at 17-18 (citing *Desert Palace, Inc. v. Costa*, 123 S.Ct 2148, 2150 (2003)). *See Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 192-93 (4th Cir. 2003); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1998); *Wytrwal v. Saco Sch. Bd.*, 70 F.3d 165, 170 (1st Cir. 1995); *N. Miss. Communications, Inc. v. Jones*, 951 F.2d 652, 654 (5th Cir. 1992); *Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 85 (2d Cir. 1992); *O'Brien v. Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989). The Ninth Circuit, however, applied an "any permissible factor" standard in this case. Because the Ninth Circuit's new "any permissible factor" standard cannot be squared with the case law in the majority of its sister circuits nor, indeed, with this Court's teachings on this topic, the Court should grant review to address this significant circuit conflict and departure from Supreme Court jurisprudence.

[9] The lower court's erroneous decision also has implications beyond the cable industry. To the extent that it is applied by federal courts in other contexts, the Ninth Circuit opinion will lead to incorrect outcomes whereby actions in violation of federal law are justified -- whether based on the appeals court's flawed treatment of mixed motives or its excessive deference to local government. *See, e.g., Center for Fair Public Policy v. City of Phoenix, State of Arizona, et al.*, 336 F.3d 1153, 1168-69 (9th Cir. 2003) (citing Ninth Circuit's decision below for the proposition that courts should grant deference to state government in First Amendment context).

CONCLUSION

For the reasons stated above, as well as those previously stated in the petition, reply brief and amicus brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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